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**FROSTY TREATS**

**VS.**

**SONY "TWISTED METAL"**

**A STUDY OF LIKELIHOOD OF CONFUSION**

June 2003

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## **DECLARATION OF PHILIP JOHNSON**

I, Philip Johnson, state as follows:

### **I. BACKGROUND**

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.
2. I have been with this firm since 1971. Over the past 32 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases where I have offered survey evidence during the past five years are attached in Appendix A of this Declaration.

## II. INTRODUCTION

3. I was contacted by Counsel from the law firm, Lathrop & Gage, on behalf of their client, Frosty Treats, a manufacturer of ice cream products. Counsel informed of a dispute that had arisen between Frosty Treats and Sony. Sony manufactures a PlayStation video game called Twisted Metal that uses an evil clown character called Sweet Tooth, and a white "Frosty Treats" ice cream van that is similar in appearance to the real Frosty Treats ice cream van. In at least one version of this game, the white ice cream van bears the "Frosty treats" name. Frosty Treats alleges that Sony's use of the white "Frosty Treats" ice cream van and the evil clown character, Sweet Tooth, is likely to cause confusion (forward and reverse) in the marketplace between their offering and the Twisted Metal video game products produced by Sony.
4. I was asked to design and conduct a consumer survey to measure the extent, if any, to which members of the appropriate video game playing universe, when exposed to the real Frosty Treats ice cream van, would mistakenly believe that this Frosty Treats ice cream truck or clown character is associated with the Sony Twisted Metal video game. I told Counsel that I could, and proceeded to design and conduct such a study. What follows is a report on the design, execution, and results of this research.

### III. METHODOLOGY

5. Information comes from personal interviews conducted between June 2002 and June 2003, with pre-teen and adolescent boys in Kansas City and St. Louis, Missouri. These 205 interviews were conducted in shopping mall based research facilities, and divided evenly between Kansas City (100) and St. Louis (105). To qualify for interview, the respondent must have been a boy between 8 and 15 years of age, who currently has Sony PlayStation at home and plays the Sony PlayStation video game called Twisted Metal.
6. The data in this report is based on 102 observations in the “test” cell, which exposed respondents to a picture of a real Frosty Treats ice cream truck, and where interviewing was conducted in June 2002 as well as in June 2003. The control cell described in this report, which exposed respondents to a non-Frosty Treats ice cream truck (Kansas City Ice Cream Truck Company), includes 103 personal interviews that were conducted in June 2003.
7. Before interviewing began, participants were “screened” to determine their qualification for the study. The screening interview proceeded as follows:

Question I:

*“Before we begin, what is your age?”*

Question II:

*“Do you currently have Sony PlayStation at home?”*

Question III:

*"Do you ever play a Sony PlayStation video game called...(ASK FOR EACH)*

*-Final Fantasy*

*-Driver 2*

*-Twisted Metal*

*-Tony Hawk's Pro Skater 3*

*-Virtual Fighter?"*

Question IV:

*"Have you participated in any market research survey in the past three months?"*

8. Once the respondent qualified, they were escorted to the research facility to conduct the interview. Participants were shown either the test exhibit or the control exhibit.

Respondents were handed the exhibit and told to feel free to comment on anything that strikes them about it, either positively or negatively.

Question 1:

***"HAND RESPONDENT EXHIBIT. SAY: Here is a picture of an ice cream truck that you may or may not be familiar with. Please take a look at this. Feel free to comment on anything that strikes you about it, either positively or negatively. RECORD SPONTANEOUS COMMENTS."***

9. After viewing the exhibit and recording any spontaneous comments, the respondent was asked whether they are familiar with it, and what they know about it. Respondents were then asked directly whether or not it reminded them of an ice cream truck or character they may be aware of. Respondents who said it reminded them of an ice cream truck or character were then asked what ice cream truck or character they were thinking of. The interview proceeded as follows:

Question 2a:

*"Are you familiar with or have you ever seen or heard of this before?"*

Question 2b:

*"IF YES: Tell me what you know about it. PROBE: What else do you know about it? PROBE FOR COMPLETE RECALL."*

Question 3a:

*"ASK OF ALL: Specifically, does this OR does this not remind you in any way of an ice cream truck or character that you have seen before or are aware of?"*

Question 3b:

*"IF YES: What ice cream truck or character is that? Tell me about it in your own words. PROBE FOR COMPLETE RECALL."*

Question 3c:

*"What makes you say that? PROBE: Anything else?"*

10. Finally, classification information was secured and the interview completed. Copies of the questionnaire, interviewing instructions, and the exhibits used are included in Appendix B of this report.
11. Based on the sample size of 100 cases in each cell, the statistical error rate for the key measures in this study fall into the range of  $\pm 7.8\%$  for a statistic such as 20% at the 95% confidence level. In other words, one would expect that 95 times out of 100, a measurement which was actually 20% would be accurately represented in the data by a statistic as high as 27.8% or as low as 12.2%.

12. Interviewing was administered and supervised, under my direction, by Survey Center, L.L.C., a company that specializes in the administration of market research surveys. Survey Center is the data collection division of Leo J. Shapiro and Associates and is a member of the Market Research Association. Interviewing was conducted by trained interviewers who were briefed specifically on this project.
13. The survey used a "double-blind" approach, where neither the respondent nor the interviewers conducting the study were aware of the purpose of the research or the identity of the party who commissioned it. The methodology, survey design, execution, and reporting were all conducted in accordance with generally accepted standards of objective procedure and survey technique.
14. Independent validation was conducted by telephone, which involved re-establishing contact with the persons who were interviewed in the study. Based on this re-contact, overall, none of the 205 interviews failed during the validation procedure.
15. The work performed to design, carry out, and report this study is covered by a billing of \$30,000. Additional time required for trial testimony or deposition, will be billed at a rate of \$5,000 per day, plus expenses.



## IV. RESULTS

### Test Cell Results: Frosty Treats

16. When respondents in this study were exposed to a picture of the Frosty Treats ice cream truck and their spontaneous comments were recorded, overall, 17% of respondents mention the belief that it is from the Twisted Metal game or that it depicts "Sweet Tooth" the clown from the Sony PlayStation game.

Question 1:

***"HAND RESPONDENT EXHIBIT. SAY: Here is a picture of an ice cream truck that you may or may not be familiar with. Please take a look at this. Feel free to comment on anything that strikes you about it, either positively or negatively. RECORD SPONTANEOUS COMMENTS."***

ALL RESPONDENTS	<u>Test</u> (102) 100%
<u>Twisted Metal/Sweet Tooth mentions (net):</u>	<u>17%</u>
Reminds me of Sweet Tooth	9
Looks like it's the truck from Twisted Metal	6
Clown from Twisted Metal	2
<u>Other mentions (net):</u>	<u>60%</u>
It's an ice cream truck	13
The clown (unelab.)	10
Looks like my neighborhood ice cream truck	8
Jimmy Neutron/Simpsons	7
Ice cream	6
Never seen it before	4
Lots of variety	4
Lots of characters	2
Reminds me of a game	2
Don't like the color	2
Like the colors	2
Familiar with it	2
Like the clown	2
A design for kids	2
Lots of stickers on it	2
Other (single mentions)	22
Not answering	9

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

17. When respondents were subsequently asked if they are familiar with or have ever seen the ice cream van before, nearly one half (47%) of these respondents report that they are familiar with this ice cream van. Respondents who say they are familiar with the ice cream van were then asked what they know about it. Respondents most frequently mention that it sells ice cream (22%), and it is an ice cream truck (13%).

Question 2a:

*"Are you familiar with or have you ever seen or heard of this before?"*

Question 2b:

***"IF YES: Tell me what you know about it. PROBE: What else do you know about it? PROBE FOR COMPLETE RECALL."***

	<u>Test</u>
ALL RESPONDENTS	(102)
No/Don't know	<u>100%</u>
Yes	53%
	<u>47</u>
<u>IF YES: What do you know?</u>	<u>47</u>
Sells ice cream/it's ice cream	22
Ice cream truck	13
Similar one in my neighborhood	6
In Twisted Metal	5
Seen it before	3
Good stuff	1
Sweet Tooth truck	1
I buy Frosty Treats	1
White with clowns on it	1
Other	10

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

18. Each survey respondent was then asked a direct question as to whether or not this reminded him of an ice cream truck or character they may be aware of. Overall, 57% of respondents report that the Frosty Treats van depicted in the exhibit does remind them of an ice cream truck or character they may be aware of. Respondents who said it reminded them of an ice cream truck or character were then asked what ice cream truck or character they were thinking of. Respondents most frequently mention Sweet Tooth in Twisted Metal (16%), or the truck from Twisted Metal (5%).

Question 3a:

**"ASK OF ALL:** Specifically, does this OR does not remind you in any way of an ice cream truck or character that you have seen before or are aware of?"

Question 3b:

**"IF YES:** What ice cream truck or character is that? Tell me about it in your own words. **PROBE FOR COMPLETE RECALL.**"

ALL RESPONDENTS	Test (102)
No/Don't know	100%
Yes	43%
	57
<u>IF YES: What truck/character?</u>	57
<u>Twisted Metal mentions (net):</u>	34
Clown/Sweet Tooth in Twisted Metal	8
Sweet Tooth	8
Truck from Twisted Metal	5
Reminds me of Twisted Metal	5
Clown in the game	3
The "one" in Twisted Metal	3
That mad clown/scary clown	1
Clown is the boss of Twisted Metal	1
Sweet Tooth drives truck	1
<u>Other Mentions (net):</u>	24
Bird/Jimmy Neutron/Tigers	5
Simpsons	5
A clown	4
Ice cream truck	4
Ice cream truck on my street	2
Characters in a lot of cartoon shows	1
Clown car	1
Not sure	1
Bump Pop truck	1

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

19. When these respondents who believe the Frosty Treats van depicted in the exhibit reminds them of an ice cream truck or character from Twisted Metal were further asked what makes them say that, respondents most frequently say they remember from playing the game (5%), and it looks like the character from Twisted Metal (5%).

Question 3c:

*"What makes you say that? **PROBE:** Anything else?"*

ALL RESPONDENTS	<u>Test</u> (102) <u>100%</u>
<u>Twisted Metal mentions (subnet):</u>	<u>34%</u>
From playing the game/played before	5
Reminds me of character/looks like it/same features	5
Sweet Tooth drives ice cream truck	4
Ice cream truck with clown	3
Ice cream truck from Twisted Metal	2
Because of clown/ice cream head or face	2
Pictures of clown	2
What I remember	2
I've seen it before	1
Truck uses weapons	1
He drives an ice cream truck	1
Looks like his truck/van	1
Twisted Metal commercial shows this truck	1
Same colors as Twisted Metal	1
Don't know/Not answering	6

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

**Control Results: Kansas City Ice Cream Truck Company**

20. When respondents in this study were exposed to a picture of a Kansas City Ice Cream Truck Company vehicle, and their spontaneous comments were recorded, only 2% of respondents mention a belief that it depicts Sweet Tooth from the Sony Twisted Metal video game.

**Question 1:**

***“HAND RESPONDENT EXHIBIT. SAY: Here is a picture of an ice cream truck that you may or may not be familiar with. Please take a look at this. Feel free to comment on anything that strikes you about it, either positively or negatively. RECORD SPONTANEOUS COMMENTS.”***

	<u>Control</u>
	(103)
ALL RESPONDENTS	100%
<u>Twisted Metal/Sweet Tooth mentions (net):</u>	2%
Reminds me of Sweet Tooth	2
<u>Other mentions (net):</u>	84%
Blue Bunny/bunny/rabbit	24
It's a yellow ice cream truck	18
It's an ice cream truck	9
Ice cream	9
It's orange	7
It's ugly/weird/different	6
Our ice cream truck is white/should be white	6
Doesn't look like a normal ice cream truck	6
There needs to be pictures/flavors on both sides	6
Good display of ice cream	6
Don't like the color	4
No windows on it	4
There is no stop sign on the truck	4
It's a bright color	4
Like the colors	3
Lots of variety	3
Looks like my neighborhood ice cream truck	2
It has two different colors	2
Has no hood	2
Familiar with it	2
Other (single mentions)	7
Not answering	15

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

21. When respondents were asked if they are familiar with or had ever seen the ice cream van before, nearly one-third (31%) of these respondents report that they are familiar with this ice cream van. Respondents who say they are familiar with the ice cream van were then asked what they know about the ice cream van. Respondents most frequently mention that it sells ice cream (14%), and it is an ice cream truck (8%).

Question 2a:

*"Are you familiar with or have you ever seen or heard of this before?"*

Question 2b:

**"IF YES: Tell me what you know about it. PROBE: What else do you know about it? PROBE FOR COMPLETE RECALL."**

	<u>Control</u>
ALL RESPONDENTS	(103)
No/Don't know	<u>100%</u>
Yes	69%
	<u>31</u>
<u>IF YES: What do you know?</u>	<u>31</u>
Sells ice cream/it's ice cream	14
Ice cream truck	8
Blue Bunny Ice Cream/Blue Bunny	5
Similar one in my neighborhood	5
Expensive	4
Good stuff	1
Clown from Twisted Metal Black	1
Other	5

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

22. Each survey respondent was subsequently asked if it reminded him of an ice cream truck or character they may be aware of. Overall, 48% of respondents in the control cell report that the van does remind them of an ice cream truck or character they are aware of. Respondents who said it reminded them of an ice cream truck or character were then asked what ice cream truck or character they were thinking of. Respondents most frequently mention Blue Bunny ice cream (16%), or Sweet Tooth from Twisted Metal (12%).

Question 3a:

**"ASK OF ALL:** Specifically, does this OR does not remind you in any way of an ice cream truck or character that you have seen before or are aware of?"

Question 3b:

**"IF YES:** What ice cream truck or character is that? Tell me about it in your own words. **PROBE FOR COMPLETE RECALL.**"

	<u>Control</u>
	(103)
ALL RESPONDENTS	<u>100%</u>
No/Don't know	52%
Yes	<u>48</u>
<u>IF YES: What truck/character?</u>	<u>48</u>
<u>Twisted Metal mentions (net):</u>	<u>19</u>
Clown/Sweet Tooth in Twisted Metal	8
Truck from Twisted Metal	5
Sweet Tooth	4
Reminds me of Twisted Metal	2
Mad clown/scary clown	1
<u>Other mentions (net):</u>	<u>29</u>
Blue Bunny/Blue Bunny ice cream	16
Ice cream truck on my street	4
Ice cream truck	3
Bugs Bunny	2
Seen a different ice cream truck	2
Good ice cream	1
Tweety/Bubbles/Rafael/Monsters Inc. characters	1
Not from the game, there's no clown	1
Wareo Nintendo	1
A clown	1

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

23. When the results of all the survey questions are considered collectively, the net mentions of Twisted Metal or Sweet Tooth among respondents viewing the Frosty Treats exhibit stands at 36%. In contrast, the net mentions of Twisted Metal or Sweet Tooth among respondents viewing the control exhibit stands at only 18%.

**Net Mentions (Questions 1-3)**

**EXHIBIT SHOWN:**

	Frosty Treats (Test) (102) <u>100%</u>	Kansas City Ice Cream (Control) (103) <u>100%</u>
<u>Net Spontaneous Mentions:</u>	<u>18%</u>	<u>3%</u>
Question 1 Spontaneous Comments	17	2
Question 2b	1	1
<u>Net Aided Mentions:</u>	<u>19%</u>	<u>16%</u>
Question 3b or 3c	19	16
<u>TOTAL:</u>	<u>36%</u>	<u>18%</u>



24. When the extent to which respondents report false beliefs is adjusted for “noise” or error by using the results from the control cell (Kansas City Ice Cream Truck Company) for comparison, overall, the adjusted likelihood of confusion stands at 18% of the survey respondents ( $36\% - 18\% = 18\%$ ). Moreover, even if one only considers the confusion that occurs spontaneously when respondents see the Frosty Treats exhibit or the control exhibit, the adjusted confusion rate stands at 15% of survey respondents ( $18\% - 3\% = 15\%$ ).

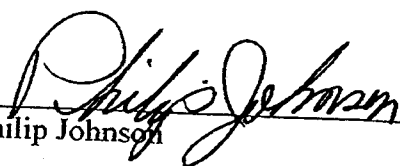
	<u>TEST CELL</u>		<u>CONTROL CELL</u>		<u>Adjusted Level of Confusion</u>
Percent Identifying Ice Cream Van with Twisted Metal or Sweet Tooth:	<u>Frosty Treats</u>		<u>Kansas City Ice Cream</u>		
...in Q.1: On a spontaneous basis	17%	-	2%	=	15%
...in Q.2: What do you know about it?	1%	-	1%	=	0%
...in Q.3: Does it remind you?	19%	-	16%	=	3%
Total Net Confusion:	36%	-	18%	=	<u>18%</u>

V. CONCLUSIONS AND OPINIONS

25. Based on the results of this study, it is clear that there is a significant likelihood of confusion (18%), such that adolescent and pre-teen boys who play the Sony PlayStation video game and encounter an ice cream van bearing the Frosty Treats logo will mistakenly believe there is a relationship or association between the Sony game and the real Frosty Treats truck or clown character.

Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on June 27, 2003 in Chicago, Illinois.

  
Philip Johnson

### **APPENDIX C**

- Verbatims

#69

Q1: "It looks like Sweet Tooth's ice cream truck that he blows up people with. Has Bart Simpson on. Clown looks annoying."

Q.2b: "It's an ice cream truck. I seen it in Twisted Metal 3 and 4."

Q.3b: "Sweet Tooth drives this truck."

Q.3c: "Because I have played the game."

\*\*\*\*\*

#122

Q.1: "What is it supposed to be from the video game?"

Q.2b: "It's probably from Twisted Metal on PlayStation."

Q.3b: "The truck and clown on the video game."

Q.3b: "That's the only thing with an ice cream truck that I can think of."

\*\*\*\*\*

#125

Q.1: "It looks like the one of Twisted Metal video game."

Q.2b: "It's an ice cream truck."

Q.3b: "The one in Twisted Metal game."

\*\*\*\*\*

#130

Q.1: "First one on top looks like a regular ice cream truck. The one on the bottom looks similar to the truck in Twisted Metal."

Q.2b: "The trucks sell ice cream. Sometimes kidnappers drive trucks like this to trick kids. They sell cartoon character ice cream."

Q.3b: "It reminds me of normal ice cream trucks and the clown's vehicle in Twisted Metal."

Q.3c: "Don't know."

\*\*\*\*\*

#132

Q.1: "Its from Twisted Metal."

Q.2b: "If its from Twisted Metal, it's the ice cream truck that shoots missiles."

Q.3b: "The clown on top of it in the game."

Q.3c: "I don't know."

\*\*\*\*\*

#151

Q.1: "It is good to have a big freezer in a truck like this. There are several different types of ice cream trucks in the game Twisted Metal. There is a crazy looking clown that drives the truck in the game."

Q.2b: "This type of ice cream is in the game Twisted Metal. The ice cream truck turns into a giant robot while it is truck form."

Q.3b: "My favorite character is Sweet Tooth in the game. It also reminds me of Twisted Metal Black because that is the most recent one I have played."

Q.3c: "Sweet Tooth is the only person who drives the ice cream truck."

\*\*\*\*\*